

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.529 of 1978

Against the judgment and decree dated 19.6.1978 passed by Sri Brij Kishore Thakur, 2<sup>nd</sup> Additional Subordinate Judge, Siwan in Title Suit No. 205 of 1975.

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Bhagyamani Devi & Ors

.... .... Plaintiffs/Appellants

Versus

Sheo Keshara Devi & Ors

.... .... Defendants/Respondent/s

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**Appearance :**

For the Appellants :

Mr. Rajendra Prasad, Sr. Advocate  
Mr. Pramod Kumar, Advocate,  
Mr. Ritesh Kumar, Advocate,  
Mr. Bimal Kumar Datta, Advocate,  
with him.

For the Respondents :

Mr. Satyendra Narayan Singh, Advocate,  
Mr. Prabhakar Nath Rai, Advocate.


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**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO**  
**CAV JUDGMENT**

**Date: 03-04-2012**

**Mungeshwar 1.**        The plaintiffs have filed this first appeal against the  
**Sahoo, J.**                impugned judgment and decree dated 19.6.1978 passed by Sri Brij  
Kishore Thakur, learned 2<sup>nd</sup> Additional Subordinate Judge, Siwan in  
Title Suit No. 205 of 1975 dismissing the plaintiffs appellants' suit  
for declaration that the sale deed executed by Subhawati Devi  
claiming herself to be the widow of Uma Shankar is void and  
executed by a person without title.

2. The plaintiffs' case in short is that Nayak Bhagat had three sons namely Mathura, Gokul and Udham. Mathura died issueless. Gokul had three sons namely Bhuwal, Bharat and Jawahar. Bharat and Jawahar died issueless. Bhuwal had three sons namely Ram Shankar, plaintiff No.2, Shiv Shankar, plaintiff No.1 and Uma Shankar. Uma Shankar died issueless in the estate of jointness with his brother. The entire property of Nayak's family was inherited by the plaintiffs and are in possession of the same. They have also claimed title by adverse possession. The further case is that the co-villager Mukhiya Bishwanath Missir with a view to grab the property got a collusive sale deed executed on 19.7.1975 for 5 bigha 19 kattha 4 dhur land in the name of his relation namely Riksheshwar Nath Tiwari, the defendant from one Subhawati Devi who executed the sale deed claiming herself to be the widow of Umashankar. The said Subhawati executed the sale deed and claimed that she had also a daughter namely Kalindi Kumari. According to the plaintiffs Subhawati and Kalindi had no concern whatsoever with Uma Shankar and they are imposters whose identification shall be given latter on after verification. In view of the fact that Subhawati Devi or Kalindi had no relation with Uma Shankar they had no title to execute the sale deed and therefore, the sale deed is void and without consideration.



3. The defendant appeared and filed contesting written statement. The case of the defendant in short is that Uma Shankar died on 20.12.1970 leaving behind his widow Subhawati and a daughter Kalindi who was born on 22.12.1968. The widow and the daughter succeeded to the properties of Uma Shankar and even the name of Subhawati Devi was mutated with respect to the property. She herself and on behalf of minor daughter sold the suit property for Rs.40,000/- and delivered the possession of the property in favour of the defendants. The other allegations were denied.


4. On the basis of the aforesaid pleadings the court below framed following issues :

- “(i) Have the plaintiffs cause of action for the suit ?
- (ii) Is the suit, as framed, maintainable ?
- (iii) Is the court fee paid sufficient ?
- (iv) Is the suit barred by the law of limitation ?
- (v) Whether the plaintiffs have right, title and interest in the suit properties ?
- (vi) Did Uma Shankar die leaving behind his wife Subhawati Devi and a daughter named Kalindi ?
- (vii) Is the sale deed executed by Subhawati genuine, valid and for consideration ?
- (viii) Are the plaintiffs entitled to the relief sought for or any other relief ?”

5. After trial the learned court below came to the conclusion that Uma Shankar died leaving behind his widow Subhawati and a daughter Kalindi and the sale deed is genuine and valid and is for consideration.

6. The learned senior counsel appearing on behalf of the appellants submitted that the judgment and decree passed by the court below is passed on inadmissible evidence and therefore, it is perverse and is liable to be set aside. The learned counsel further submitted that the court below has wrongly relied upon Ext. A and H. The learned court below also wrongly relied upon the evidence of DW 8 DW 12 and DW 13 particularly, when the plaintiffs adduced evidence of PW 8 who has categorically stated that Harihar has already died but the defendants examined another person as DW 8 who claimed himself to be Harihar. The learned counsel further submitted that the main role is played by the Mukhiya who obtained the sale deed from a fictitious lady who claimed to be the widow of Uma Shankar. Overwhelming evidence has been adduced on behalf of the plaintiffs but the learned court below has misread the evidence and dismissed the suit.


7. On the other hand, the learned counsel appearing on behalf of the respondents submitted that the suit itself was not maintainable in absence of Subhawati Devi who is necessary party. The defendants



produced Subhawati Devi as DW 13 in the court below. The father of the Subhawati Devi was also examined as DW 8 and the daughter Kalindi was examined as DW 12 but even then the plaintiffs did not make Subhawati Devi as party to the suit. In such circumstances, the learned court below could not have recorded a finding that she is not the widow of Uma Shankar. Particularly, when she herself claimed that she is the widow of Uma Shankar and Kalindi is her daughter. In absence of Subhawati no different finding can be recorded. Moreover the defendants have adduced oral as well as documentary evidences and the learned court below after considering the said evidences meticulously recorded a finding that Subhawati Devi is the widow of late Uma Shankar and Kalindi is her daughter through Uma Shankar. On the basis of the above grounds, the learned counsel submitted that the first appeal is liable to be dismissed.


**8.** In view of the above contentions of the parties the point arises for consideration in this appeal is, as to whether Subhawati Devi who executed the sale deed in favour of the defendant respondent is the widow of Uma Shankar Bhagat ?

**9.** So far the other submissions of the learned counsel for the appellants that the sale deed is void because of without consideration is concerned this question does not arise for consideration because if it is held that Subhawati is the widow of Uma Shankar then the




plaintiffs cannot challenge passing of consideration because the said Subhawati Devi has been examined as DW 13 who has accepted that she has received the consideration. The plaintiff being third person to the transaction cannot challenge passing of consideration. If it is held that Subhawati is not the widow of Uma Shankar then also that question will not arise for consideration because if she is not the widow she will have no right to transfer the property of Uma Shankar.

**10.** As stated above the case of the parties, according to the plaintiffs Subhawati is not the widow of Uma Shankar and Uma Shankar died issueless. One Bishwanath Missir who is Mukhiya of Gram Panchayat got the sale deed executed by a fictitious lady claiming herself to be the widow of Uma Shankar. On the contrary, according to the defendants Uma Shankar Died leaving behind his widow Subhawati Devi and a daughter Kalindi. Subhawati Devi executed a sale deed for self and on behalf of her minor daughter Kalindi. It is admitted case that Uma Shankar Bhagat died on 20.12.1970. In support of their respective cases the parties have adduced evidences. The witnesses of the plaintiffs i.e. PWs 3, 6, 7 and 9 supported the case of the plaintiffs to the effect that Uma Shankar died issueless. PW 3 is the plaintiff himself. No doubt, in the plaint there is no pleading to the effect that who was the widow of



Uma Shankar and when she died nor there is any pleading that daughter of one Parduman was married to Uma Shankar Bhagat, the witnesses PW 3, 6, 7 and 9 have stated so in their evidence. It is well settled principles of law that no amount of evidence can be looked into upon a plea which was never put forward and a court cannot make out a case not pleaded. The court should confine his decision to the question raised in the pleading. According to the plaintiffs Uma Shankar died issueless. There is no pleading to the effect that the daughter of Parduman was married with Uma Shankar Bhagat. Therefore, the evidences of these witnesses to this effect cannot be looked into nor can be relied upon. Likewise PW 8 Parduman Bhagat has stated that his daughter was married with Uma Shankar Bhagat who died. This evidence is also not reliable because of want of foundational pleading. This case has been developed during the course of the evidence. PW 6 and 7 have stated that the widow of Uma Shankar Bhagat died. To prove the marriage of daughter of PW 8 with Uma Shankar PW 9 has been examined who claimed himself to be the Priest. As stated above since there is no pleading this evidence is not admissible.


**11.** Now let us examined the witnesses of the defendants respondents. DW 8 is the father of Subhawati Devi. He has stated that his daughter was married with Uma Shankar and a daughter namely




Kalindi was born out of the wedlock. It may be mentioned here that the plaintiffs have admitted that earlier Uma Shankar was married with the daughter of Harihar Bhagat. The learned counsel for the appellants submitted that PW 8 has stated that Harihar Bhagat had died and, therefore, the defendants have brought another fictitious person who is claiming to be the father of Subhawati. So far this submission is concerned, I do not find any such basis. No suggestion has even been given to this witness to this effect. DW 12 is Kalindi daughter of Subhawati through Uma Shankar. She was 9 years old at the time of her examination as witness. She had identified Ram Shankar in the court and also claimed to identify Shiv Shankar but it appears that when she was being examined and she claimed to identify Shiv Shankar the latter left the court room. The learned counsel Mr. Pradhan submitted that she is the tutored witness. So far this submission is concerned, it does not appear from her evidence that a tutored witness can depose in such clear term. Considering the age when she was examined her evidence cannot be discarded on mere submission that she is a tutored witness.

**12.** DW 5 is the defendant himself who has fully supported his case pleaded. DW 13 is Subhawati herself. She has claimed that she was married with Uma Shankar. DW 14, DW 16 have also stated that Uma Shankar died leaving behind his widow Subhawati. Besides the






above oral evidences the defendants have produced Ext. A and H. Ext. A is the entry in Original Registrar of Odhikhor Gram Panchayat for recording and registering birth and death. From perusal of the said register it appears that on 22.12.1968 a female child was born to Uma Shankar Bhagat and Subhawati Devi on the basis of the information given by DW 15 who is chaukidar and the entry was made by Panchayat Sewak who has been examined as DW 18 on behalf of defendants. So far this Ext. A is concerned the learned counsel Mr. Pradhan submitted that this document has no legal sanctity because the Registration of Births and Deaths Act itself is of the year 1969 and, therefore, prior to coming into force of the Act the register could not have been maintained in the Gram Panchayat. So far this submission is concerned, it may be mentioned here that prior to this 1969 Act there was Births, Deaths and Marriages Registration Act, 1886 (6 of 1886) and under that Act the registrations were being done. It further appears that this Ext. 1 is register supplied by the government and specific guidelines has been provided therein. Therefore, I do not find any merit so far this submission is concerned. The learned counsel next submitted that DW 18 and DW 15 have been managed by Mukhia and the entries were made subsequently. So far this submission is concerned it appears that this mere is submission and is without any basis and, therefore, cannot be



accepted. The register is prepared in the official discharge of duty by the Panchayat and there is presumption of correctness of the official record. Once it is produced and proved legally it is for the plaintiffs to prove that in fact either it is forged or subsequently it was entered into. In view of the above facts the submissions of the learned counsel cannot be accepted.

**13.** Ext. H is an application filed by the plaintiff No.1 Shiv Shankar Bhagat himself before the B.D.O. From reading of the said application it is clear that he himself filed the application alleging that some body filed the application claiming for mutation of the name of Subhawati wife of Uma Shankar and the application has not been filed by Subhawati Devi. Subhawati Devi is residing in her 'Naihar' and, therefore, the plaintiff himself prayed that unless she appears before the B.D.O. her name should not be mutated. Nowhere the identity of Subhawati Devi has been disputed in this application. Rather he has admitted the name of wife of Uma Shankar as Subhawati Devi. It is not his case in this application that Subhawati Devi had also died earlier or that wife of Uma Shankar is not alive.

**14.** In view of the above facts it appears that Subhawati Devi executed the sale deed claiming herself to be the widow of Uma Shankar. She was examined as DW 13 claiming herself to be the widow of Uma Shankar. Registered sale deed has been produced by



the defendant which has been marked as Ext. G. Therefore, the plaintiffs should have made her party defendant in the suit because in her absence the relief for declaration that she is not the widow of late Uma Shankar cannot be granted. The learned counsel for the appellants submitted that no defence has been taken by the defendant that the suit is bad for non-joinder of necessary party as required under Order 1 Rule 13 C.P.C. So far this submission is concerned, in view of the proviso to Order 1 Rule 9 if necessary party is not added the suit is liable to be dismissed on that score alone. In the present case, the nature of relief claimed by the plaintiffs is that Subhawati Devi executed the sale deed claiming herself to be the widow of Uma Shankar therefore, the sale deed is void and she is not the widow. In my opinion, therefore, Subhawati Devi DW 13 was necessary party. Likewise DW 12 the daughter of Subhawati Devi namely Kalindi is also necessary party. In their absence no finding affecting their status regarding the parentage of DW 12 or the relation of Subhawati Devi with Uma Shankar can be given. Moreover, in view of the above discussion of the evidences oral as well documentary, I find that the defendants have been able to prove that Subhawati Devi is the widow of Uma Shankar and Kalindi is their daughter.

**15.** The learned counsel for the appellants submitted that no consideration is passed through the sale deed. So far this submission

is concerned, we have seen above that Subhawati Devi is the widow of Uma Shankar and, therefore, passing of consideration is between the purchaser and Subhawati Devi. Third person cannot challenge passing of consideration when Subhawati herself admitted.

**16.** In view of the above facts and circumstances of the case, the finding of the learned court below on these points are therefore, confirmed. It is held that Subhawati Devi is the widow and Kalindi is the daughter of Uma Shankar Bhagat. Ext. B is the entry in the death and birth register which shows that on 20.12.1970 Uma Shankar died. Therefore, 1/3<sup>rd</sup> share will go to them. Therefore, they have the right to sell their share and accordingly, it cannot be said that the sale deed is either without consideration or that executed by person having no title.

**17.** In the result, this first appeal is dismissed with cost of Rs.10,000/- to be paid by the appellants to the respondents within one month. If it is not paid within the said period the respondents shall be at liberty to realize the same through process of the Court.

**(Mungeshwar Sahoo, J.)**

**Patna High Court,  
Patna  
The 3<sup>rd</sup> April, 2012  
S.S./ N.A.F.R.**